Mohammad bin Abdul Kadir v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 41–115 OF 2010
MOHD ZAKI ABDUL WAHAB JC
10 JULY 2012

Criminal Law — Outraging modesty — Conviction and sentence — Appeal against — Evidence of child of tender years — Evidence on oath — Learned magistrate conducted inquiry to determine child's understanding — Whether mandatory requirements of s 133A of the Evidence Act 1950 considered — Whether learned magistrate erroneously made ruling against weight of evidence before him — Whether conviction unsafe — Penal Code s 354 — Evidence Act 1950 s 133A

Evidence — Witness — Child witness — Competency — Whether child understood nature of oath — Whether learned magistrate had considered mandatory requirements of s 133A of the Evidence Act 1950

The appellant was charged before the magistrates' court for outraging the modesty of the victim, SP3 — a 9 year old girl, an offence under s 354 of the Penal Code. The prosecution case against the appellant relied heavily on testimonies of the victim ('SP3'), her younger sister, ('SP4'), her mother ('SP1') and her father ('SP2'). The complainant of this case was SP1. She gave evidence on how she discovered the appellant's alleged criminal act. It all started from the cry of SP3 in her sleep one night which was overheard by SP1. The very next morning, SP1 queried SP3 on her dream, whereupon SP3 related to her the alleged act by the appellant. On hearing this, she lodged a police report against the appellant. The learned magistrate convicted the appellant based on the evidence of two important witnesses namely, SP3 and SP4, children of tender years. When they were called to give evidence before the learned magistrate, SP3 was 11 years old while SP4 was only 9 years old. The appellant was sentenced to 20 months imprisonment. The appellant appealed against the conviction and sentence.

Held, allowing the appeal, acquitting and discharging the appellant:

(1) There is no prohibition against the admissibility of evidence of a child of tender years. Indeed evidence of a child of tender years may be admitted in any criminal trial, depending on the quality of his/her intelligence. His/her evidence could be readily admitted in any criminal trial, if it is proved the child is sufficiently intelligent to understand the meaning of

an oath and appreciates the consequences of an oath. In that situation, his/her evidence will be recorded in a manner any other witness's evidence is recorded. The evidence of a child of tender years may also be admitted even if the child does not understand the oath. In that situation, it must be proved the child possesses sufficient intelligence to give evidence, although he/she does not understand the need to affirm an oath. In this regard the evidence will be given but not on oath. It shall be treated as a deposition. Such a situation is provided by s 133A of the Evidence Act 1950 (see paras 11–12).

(2) The inquiry conducted by the learned magistrate did not conform to the requirement under s 133A. Clearly the inquiry was not conducted with the objectives mentioned under s 133A. In other words, the inquiry was not held properly with the proper objectives as required by the said section. The inquiry conducted to determine the child's understanding of evidence on oath was not an inquiry provided under s 133A and was not sufficient to determine that SP3 actually understood the oath she had affirmed. In the absence of any record, the learned magistrate had not, in any way made a finding that SP3 understood the oath that she had affirmed. In the circumstances the learned magistrate could have admitted SP3's evidence without oath as allowed under s 133A. However, to do that, the learned magistrate must have complied with the proviso under s 133A which requires conformity to s 269 of the Criminal Procedure Code. Here, the learned magistrate had failed to comply with the requirement under this proviso, even if SP3's evidence was admitted without an oath (see paras 26–27).

(3) Similarly, the evidence of SP4, if admitted, must have conformed to the requirements under s 133A. The appeal record showed that she gave evidence on oath. It was also clear that the learned magistrate conducted an inquiry before allowing her to testify. Based on these notes, the learned magistrate had made a ruling that SP4 understood the oath. This clearly contradicted the earlier notes that showed that SP4 could not understand the nature of an oath. Therefore, the learned magistrate had erroneously made a ruling against the weight of evidence before him. It is wrong for the learned magistrate to rule that SP4 understood the oath where it was clearly admitted by SP4 that she could not understand the oath. SP4's evidence, if at all, should have been admitted by the learned magistrate without oath, the learned magistrate must comply the requirements mentioned in the proviso to s 133A. As the inquiry to admit SP4's evidence was not held in conformity with s 133A, her evidence was improperly admitted by the learned magistrate (see paras 28, 30 & 37).

(4) As SP3 and SP4's evidence constituted the main evidence against the accused, their evidence must be properly admitted before it could be corroborated by the evidence of SP1 and SP2. Although SP3 and SP4

were not and could not in any way be said to be accomplices, their evidence was still doubtful, not safe to be believed and should be rejected. The evidence of SP1 and SP2 alone were insufficient to secure a conviction and more importantly could not repair the defective evidence of SP3 and SP4 (see para 43).

[Bahasa Malaysia summary

Perayu telah dituduh di hadapan mahkamah majistret kerana mencabul kehormatan mangsa, SP3 — seorang budak perempuan berumur 9 tahun, satu kesalahan di bawah s 354 Kanun Keseksaan. Kes pendakwaan terhadap perayu bergantung sepenuhnya kepada keterangan mangsa ('SP3'), adik perempuannya ('SP4'), ibunya ('SP1') dan bapanya ('SP2'). Pengadu kes ini adalah SP1. Dia telah memberi keterangan tentang bagaimana dia mendapat tahu tentang dakwaan perbuatan jenayah perayu. Ia semua bermula daripada jeritan SP3 dalam tidurnya yang SP1 terdengar suatu malam. Keesokan paginya, SP1 bertanyakan SP3 tentang mimpinya, yang mana SP3 menceritakan kepadanya tentang perbuatan yang dikatakan dilakukan oleh perayu. Setelah mendengar ini, dia membuat laporan polis terhadap perayu. Majistret yang bijaksana telah mensabitkan perayu berdasarkan keterangan dua saksi penting iaitu, SP3 dan SP4, anak-anak bawah umur. Apabila mereka dipanggil untuk memberikan keterangan di hadapan majistret yang bijaksana, SP3 berumur 11 tahun manakala SP4 berumur 9 tahun. Perayu merayu terhadap sabitan dan hukuman.

Diputuskan, membenarkan rayuan, melepaskan dan membebaskan perayu:

(1) Tiada larangan terhadap kebolehterimaan keterangan seorang kanak-kanak di bawah umur. Sememangnya keterangan kanak-kanak di bawah umur boleh diterima dalam mana-mana perbicaraan jenayah, bergantung kepada tahap kecerdikannya. Keterangannya boleh diterima pakai dalam mana-mana perbicaraan jenayah, jika dapat dibuktikan kanak-kanak itu cukup cerdik untuk memahami maksud suatu angkat sumpah dan memahami akibat angkat sumpah itu. Dalam keadaan tersebut, keterangannya akan direkodkan sebagaimana cara mana-mana keterangan saksi lain direkodkan. Keterangan kanak-kanak bawah umur juga boleh diterima walaupun jika kanak-kanak itu tidak memahami angkat sumpah itu. Dalam keadaan itu, hendaklah dibuktikan kanak-kanak itu memiliki kecerdikan yang mencukupi untuk memberikan keterangan, meskipun dia tidak memahami keperluan untuk mengesahkan angkat sumpah itu. Berhubung ini keterangan itu akan diberikan tetapi bukan atas angkat sumpah. Ia hendaklah dianggap sebagai deposisi. Keadaan sedemikian diperuntukkan oleh s 133A Akta Keterangan 1950 (lihat perenggan 11–12).

(2) Siasatan yang dilakukan oleh majistret yang bijaksana tidak memenuhi keperluan di bawah s 133A. Adalah jelas siasatan itu tidak dilakukan

dengan objektif seperti dinyatakan di bawah s 133A. Dalam erti kata lain, siasatan itu tidak dijalankan sewajarnya dengan objektif-objektif yang betul sebagaimana dikehendaki oleh seksyen tersebut. Siasatan yang diadakan untuk menentukan pemahaman kanak-kanak berhubung keterangan atas sumpah bukan suatu siasatan yang diperuntukkan di bawah s 133A dan tidak mencukupi untuk menentukan bahawa SP3 sebenarnya memahami sumpah yang disahkan olehnya. Dengan ketiadaan apa-apa rekod, majistret yang bijaksana tidak dalam apa cara membuat penemuan bahawa SP3 telah memahami sumpah tersebut yang telah disahkannya. Dalam keadaan itu majistret yang bijaksana boleh juga menerima keterangan tanpa sumpah SP3 sepertimana yang dibenarkan di bawah s 133A. Walau bagaimanapun, untuk berbuat demikian, majistret yang bijaksana hendaklah mematuhi proviso di bawah s 133A yang menghendaki pematuhan s 269 Kanun Prosedur Jenayah. Di sini, majistret yang bijaksana telah gagal untuk mematuhi keperluan di bawah proviso ini, walaupun jika keterangan SP3 telah diterima tanpa sumpah (lihat perenggan 26–27).

(3) Begitu juga, keterangan SP4, jika diterima, hendaklah memenuhi keperluan-keperluan di bawah s 133A. Rekod rayuan menunjukkan bahawa dia telah memberikan keterangan atas sumpah. Juga adalah jelas bahawa majistret yang bijaksana telah mengadakan siasatan sebelum membenarkannya membuat keterangan. Berdasarkan nota-nota tersebut, majistret yang bijaksana telah membuat keputusan bahawa SP4 memahami sumpah itu. Ini jelas berlawanan dengan nota-nota sebelum ini yang menunjukkan bahawa SP4 tidak memahami sifat suatu sumpah. Oleh itu, majistret yang bijaksana terkhilaf membuat keputusan terhadap beban keterangan di hadapan beliau. Adalah salah untuk majistret yang bijaksana untuk memutuskan bahawa SP4 memahami sumpah itu di mana ia jelas diakui oleh SP4 bahawa dia tidak memahami sumpah itu. Keterangan SP4, jika apa pun, patut diterima oleh majistret yang bijaksana tanpa sumpah, majistret yang bijaksana hendaklah memenuhi keperluan-keperluan yang dinyatakan dalam proviso kepada s 133A. Oleh kerana siasatan untuk menerima keterangan SP4 tidak diadakan dengan memenuhi s 133A, keterangannya tidak wajar diterima oleh majistret yang bijaksana (lihat perenggan 28, 30 & 37).

(4) Oleh kerana keterangan SP3 dan SP4 membentuk keterangan utama terhadap tertuduh, keterangan mereka hendaklah diterima sewajarnya sebelum ia boleh disokong oleh keterangan SP1 dan SP2. Walaupun SP3 dan SP4 bukan dan tidak mungkin dalam apa cara dikatakan sebagai rakan sejenayah, keterangan mereka masih diragui, tidak selamat untuk dipercayai dan patut ditolak. Keterangan SP1 dan SP2 sendiri tidak mencukupi untuk menjamin suatu sabitan dan lebih penting lagi tidak boleh memperbetulkan keterangan cacat SP3 dan SP4 (lihat perenggan 43).]

Notes

For cases on child witness, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2983–2996.

Cases referred to

Arumugam a/l Mothiyah v PP [1994] MLJU 175; [1995] 1 CLJ 58, HC (refd)
Chao Chong & Ors v PP [1960] 1 MLJ 238, CA (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2006] 1 CLJ 1043, CA (refd)
Muharam bin Anson v PP [1981] 1 MLJ 222, FC (refd)
PP v Abdul Malik bin Marahaji & Anor [1994] 2 MLJ 430; [1994] 2 CLJ 654, HC (refd)
PP v Chan Wai Heng [2008] 5 MLJ 798, CA (refd)
PP v Hj Ismail & Anor [1940] 1 MLJ 76 (refd)
Sidek bin Ludan v PP [1995] 3 MLJ 178, HC (folld)
TN Nathan v PP [1978] 1 MLJ 134 (refd)
Tajudin bin Salleh v PP [2008] 1 MLJ 397, HC (refd)
Yusaini bin Mat Adam v PP [1999] 3 MLJ 582; [2000] 1 CLJ 206, HC (folld)

Legislation referred to

Criminal Procedure Code ss 269, 422
Evidence Act 1950 s 133A
Oaths and Affirmations Act 1949 ss 4, 6, 8, 9

Burhanudeen (Burhan & Co) for the appellant.
Razali bin Che Ani (Deputy Public Prosecutor, Kedah State Legal Advisor Office) for the respondent.

Mohd Zaki Abdul Wahab JC:

[1] The appellant was charged before the magistrate in Alor Setar, Kedah with the following charge:

> Bahawa kamu pada 27-7-2007 jam lebih kurang 11.40 pagi, di hadapan rumah No. 106, Taman Pertama, Pokok Sena, Alor Setar, di dalam Daerah Kota Setar, di dalam Negeri Kedah Darul Aman, telah menggunakan kekerasan jenayah kepada Siti Nurul Zahirah, berumur 9 tahun dengan niat untuk mencabul penghormatannya, dengan cara memasukkan tangan ke dalam baju dan memegang buah dadanya. Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 354 Kanun Keseksaan.

[2] The prosecution case against the appellant relied heavily on testimonies of the victim 'SP3', her younger sister, 'SP4', her mother 'SP1' and her father 'SP2'. The facts of the case show that at the time of the alleged offence, the appellant was the victim's neighbour. In actual fact, the victim's family was

renting the appellant's house at that particular time. The appellant was referred as 'Tok Imam' or 'Ustaz' by SP3 and her family.

[3] SP1 is the complainant in this case. She gave evidence on how she discovered the appellant's alleged criminal act. It all started from the cried of SP3 in her sleep one night, overheard by SP1. On the very morning, she queried SP3 on her dream, whereupon SP3 related to her the alleged act by the appellant. On hearing this, she went to confront appellant about the alleged incident. She later lodged report against the appellant.

[4] The learned magistrate held the prosecution had succeeded in establishing a prima facie case against the appellant and ordered him to enter his defence. The appellant put up his defence against the charge by giving evidence on oath. At the end of the case, the learned magistrate convicted the appellant. Upon the conviction, he was sentenced to 20 months imprisonment. He now appeals against the conviction and sentence.

[5] It is clear from the appeal record that the conviction was based on the evidence of two important witnesses, SP3 and SP4. There were no doubt at all that both the witnesses are children of tender years. SP3 was 11 years old while SP4 was only nine years old when they were called to give evidence before the learned magistrate.

[6] As stated earlier, both SP3 and SP4 gave evidence on oath. Their evidence, based on the record, was, to certain extent, corroborated by SP1 and SP2's evidence. However, on close scrutiny of the record, I found there is an issue on the admissibility of their evidence before the learned magistrate.

[7] Basically the law requires a witness in any trial to affirm an oath before giving evidence. Section 4 of the Oaths and Affirmations Act 1949 (Revised 1977)('Act 194') provides:

> Section 4. Authority to administer oaths and affirmations.
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> All courts and persons having, by law, or by order of reference by any court, or by consent of parties, authority to receive evidence are authorized to administer, by themselves or by an officer empowered by them in that behalf, oaths and affirmations in discharge of the duties or in exercise of the powers conferred upon them respectively as aforesaid.

[8] Further, s 6 of Act 194 provides:

> Section 6. Persons by whom oaths are to be taken.
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> (1) Subject to section 7, oaths shall be taken by the following persons:
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> (a) witnesses, that is to say, all persons who may be lawfully examined, or

give or be required to give evidence, by or before any court or person having, as mentioned in section 4, authority to examine such person or to receive evidence;

(b) interpreters of questions put to and of evidence given by witnesses;

(c) translators; and

(d) jurors.

(2) Nothing herein contained shall render it necessary to administer to the official interpreter of any court, or to a certified interpreter in the employment of the Government of Malaysia or of any State Government when he is engaged in the performance of his duties, after such official or certified interpreter has entered on the duties of his office, an oath that he will faithfully discharge those duties.

[9] The law also requires certain form of oath needed to be administered in a prescribed manner. Section 9 of Act 194 reads:

Section 9. Form of oaths and affirmations.

Oaths and affirmations made under section 6 or section 7 shall be administered according to such forms and with such formalities as may be prescribed by rules made by the Rules Committee and, until such rules are made, according to the forms and formalities in use at the commencement of this Act.

[10] The form of oath to be affirmed by any witness before testifying in a court is formally prescribed. It reads as follows:

that, I … do solemnly and sincerely affirm that the evidence I shall give shall be the truth, the whole truth, nothing but the truth.

[11] It is trite law that there is no prohibition against the admissibility of evidence of a child of tender years. Indeed evidence of a child of tender years may be admitted in any criminal trial, depending on the quality of his/her intelligence. His/her evidence could be readily admitted in any criminal trial, if it is proved the child is sufficiently intelligent to understand the meaning of oath and appreciates the consequences of an oath. In that situation, his/her evidence will be recorded in a manner any other witness's evidence be recorded.

[12] However, evidence of a child of tender years may also be admitted even if the child does not understand the oath. In that situation, it must be proved the child possesses sufficient intelligence to give evidence, but he/she could not understand the oath needed to be affirmed. In this regard the evidence will be given not on oath, but shall be treated as a deposition. Such situation is provided by s 133A of the Evidence Act 1950 which states:

Section 133A. Evidence of child of tender years.

Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code [Act 593] shall be deemed to be a deposition within the meaning of that section:

Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

[13] At his juncture it is appropriate that I should also mention s 8 of the Oaths and Affirmations Act 1949 (Revised 1977)which is the provision that pertains to a witness of 'immature age', who could not understand a nature of oath and affirmation, may give evidence after having been cautioned of the need to tell the truth in giving evidence. Section 8 provides:

Section 8. Evidence of persons of immature age.

Any person who by reason of immature age ought not in the opinion of the court to be admitted to give evidence on oath or affirmation shall be admitted to give evidence after being cautioned by the court to speak the truth, the whole truth, and nothing but the truth.

[14] A clear analysis of the law of evidence showed that a child of tender years could give evidence in any court under two circumstances:

(a) firstly, to give evidence under oath as ordinary witness, if he is sufficiently intelligent and could also understand the nature and consequences of oath needed to be affirmed before giving evidence; or

(b) secondly, to give evidence without oath as provided by s 133A of the Evidence Act 1950.

[15] Therefore, it is very important in my view, that the court must ascertain under which circumstances evidence of a child of tender years should be recorded, either under ordinary circumstances or under s 133A of the Evidence Act 1950; before proceeding to admit his evidence.

[16] Section 133A requires an inquiry to be held before evidence is recorded. In my view the inquiry must be with two objectives in mind: first to determine whether the child is sufficiently intelligent to give evidence; and the second

objective of the inquiry is to determine whether the child could give evidence on oath or without oath. In my view the second inquiry is only need to be conducted if the result of the first inquiry shows the child possesses sufficient intelligence to give evidence. I draw support for my view from the cases of *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178 and *Yusaini bin Mat Adam v Public Prosecutor* [1999] 3 MLJ 582; [2000] 1 CLJ 206.

[17] Section 133A provides procedures for admitting evidence by a child of tender years. It does not provide rules for the weight of such evidence, which must be decided by the trial magistrate. In *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222, evidence of a child of ten years old was admitted by trial judge without oath, after an inquiry conducted. However later, the trial judge rejected the evidence on his finding of a possibility of the witness been taught by some people prior to her giving evidence. It was submitted at the appeal that the trial judge was bias in not believing the witness story. This submission was rejected by the Federal Court.

[18] In *Yusaini bin Mat Adam v Public Prosecutor* [1999] 3 MLJ 582; [2000] 1 CLJ 206, KC Vohrah J (he then was) said at p 584 (MLJ); 207 (CLJ):

> When a child of tender years is called to be a witness the procedure is for the court to hold an inquiry to form an opinion if the child is in the position to be sworn (see eg, the Federal Court case of *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222 at p 223). However, the sessions court judge did not hold such an inquiry before she allowed the child to give her evidence.

[19] The law however did not prescribe particular form of inquiry needed to be held by court under s 133A. In *Arumugam a/l Mothiyah v Public Prosecutor* [1994] MLJU 175; [1995] 1 CLJ 58 Abdul Malik Ishak J (as he then was) said at p 59:

> It is also desirable, in my considered view, that the sessions court judge should apply and record appropriate questions in the notes of evidence so as to ascertain whether the complainant understands the solemn duty of speaking the truth or not. Arising out of this, the sessions court judge should also record in the notes of evidence his opinions and reasons in arriving at the conclusions as to whether the complainant understands the solemn duty of speaking the truth or not.

[20] It appears from the case of *Public Prosecutor v Chan Wai Heng* [2008] 5 MLJ 798 the Court of Appeal was of the view that there is no specific mantra or procedure to be followed in carrying out this inquiry, suffice if it is reflected on record that the presiding judge has asked questions to determine whether the witness understands the duty to tell the truth. The Court of Appeal further rejected the contention that a *voire dire* or cross-examination should be conducted. Heliliah JCA (she then was) in that case stated as follows:

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> [35] It is clear from a scrutiny of the abovementioned paragraphs that the sessions court judge had satisfied himself that the child witness of seven years did not comprehend the oath and thereafter embarked on a process of ascertaining the child's level of understanding. There does not appear to be merit in the contention of the learned counsel for the respondent that in the process of ascertaining the competency of the child it is obligatory that the questions must have been posed by the sessions court judge himself as a prerequisite to the admissibility of the evidence. There was here not a total absence of the inquiry of ascertaining the level of understanding of the child but a suggestion that the child must be cross-examined, in other words, that there should be conducted a *voire dire*. As indicated above the decision in *Sidek bin Ludan* did not contain that suggestion. We would disagree if it were to be so suggested as it would not reflect the correct approach. Moreover the grounds of judgment and the notes of evidence of the sessions court judge disclosed that he had indeed directed his mind to the requirements of s 133A before embarking on the process of permitting the prosecution to lead evidence on the acts that were committed on SP7 by the respondent.

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[21] Now I shall revert to the appeal before me. From the record of appeal it shows that an inquiry was held by the learned magistrate, as far as SP3 and SP4's evidence were concerned. However the record shows, SP3 had affirmed an oath before the inquiry was conducted. The inquiry was conducted by the learned magistrate only after SP3 affirmed the oath. The objective of the inquiry was recorded by the learned magistrate as 'untuk tentukan samada SP3 faham maksud keterangan bersumpah'. This could be translated as 'to determine if SP3 understand the meaning evidence on aoth'.

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[22] This, to my mind, is clearly an error on the part of the learned magistrate to understand the objectives and the need to conduct inquiry under s 133A. In my view s 133A required the inquiry to be held at the initial stage immediately after the witness steps in to give evidence with the twin objectives that I have alluded to earlier, in mind; first to determine whether he possesses sufficient intelligence to give evidence and further to determine whether he could understand the nature and consequence of an oath. Nevertheless, no one will know if the child is sufficiently intelligent to give evidence before the court until an inquiry is conducted, no matter how simple and how brief the inquiry is. In my view, the reason the law requires this procedure to be followed is simply because the law recognised the need to be cautious is dealing with the evidence of a child of tender years — see the case of *Chao Chong & Ors v Public Prosecutor* [1960] 1 MLJ 238 where Thomson CJ said:

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> One reason why children's evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. In this country where evidence is taken on affirmation that consideration loses much of its force. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to

distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination.

[23] I had said earlier that the further inquiry to determine whether the witness could give evidence on oath or without oath should only be held if the court satisfied the child possesses sufficient intelligence to give evidence. If the child does not possess such intelligence quality, no evidence should be recorded from him. The question is how the child will understand the nature of an oath and accordingly will appreciate the consequence of the oath?

[24] It is my view that in conducting the inquiry, the child could be asked few simple questions initially, and if needed, gradually, more difficult questions to be posed to him; for the purpose of determining his intelligence quality. If the result proved he had the intelligence quality to give evidence, he could be shown with a document containing the prescribed form of oath as I set out before. The child should then be asked to read or should be assisted to read the prescribed form of oath. Following that the child should be asked if he understand the oath as shown to him. Depending on the answer, the magistrate should decide which form of evidence to be recorded from the child.

[25] The appeal record in this case shows that the learned magistrate conducted the inquiry after the witness had affirmed an oath. The record contained answers given by SP3, which I believed, arising from questions posed to him. At the end of the answers the learned magistrate made the following notes:

Mahkamah-Mahkamah berpuas hati SP3 faham maksud keterangan bersumpah. Keterangan diberikan akan diterima sebagai keterangan bersumpah dari kandang saksi.

[26] There is no doubt there was an inquiry held by the learned magistrate. However, in my view the inquiry conducted did not conform to the requirement under s 133A of the Evidence Act 1950. Clearly the inquiry was not conducted with the objectives mentioned under s 133A as I had explained earlier. In other words, the inquiry was not held properly with the proper objectives as required by s 133A. The inquiry, conducted to determine the child's understanding of evidence on oath was not an inquiry provided under s 133A and is not sufficient to determine that SP3 actually understood the oath he had affirmed. In the absence of any record, I found the learned magistrate had not, in any way made a finding that SP3 understood the oath that he had affirmed.

[27] In the circumstances the learned magistrate could admit SP3's evidence without oath as allowed under s 133A. However, to do that, the learned

magistrate must comply with the proviso under s 133A which requires conformity to s 269 of the CPC. I found the learned magistrate had failed to comply with the requirement under this proviso even if SP3 evidence was admitted without an oath.

[28] Now I shall turn my attention to SP4's evidence. Clearly, she was also a child of tender years. Her evidence, if admitted must conform to the requirements under s 133A. The appeal record shows that she gave evidence on oath. It was also clear that the learned magistrate conducted inquiry before allowing her to testify. In the inquiry there was an answer by SP4 as follows:

> saya tidak faham apa itu sumpah tetapi tahu kalau cakap bohong berdosa.

[29] Further record contained the following notes:

> Mahkamah-P/hadir (puashati?) bahawa SP4 faham maksud sumpah dan nampak jauh lebih matang dari usianya. Keterangan SP4 atau (akan) diterima sebagai keterangan bersumpah

[30] Based on this notes, the learned magistrate had made a ruling that SP4 understood the oath. This clearly contradicted the earlier notes that show that SP4 could not understand the nature of an oath. Therefore, in my view, the learned magistrate had erroneously made a ruling against the weight of evidence before him. It is wrong for the learned magistrate to rule that SP4 understood the oath where it was clearly admitted by SP4 that she could not understand the oath.

[31] It is clear that the learned magistrate had made the following observation:

> SP4 faham maksud sumpah dan nampak jauh lebih matang dari usianya

[32] It is not wrong at all, for a magistrate to record certain observation on witness that gave evidence before him as he had full audio visual advantage. It is also trite law that ordinarily an appellate court will not or will be slow in overturning a finding of fact by trial court. In *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043, the Court of Appeal in observing this, said:

> [16] In respect of the contention that the learned trial judge erred in his assessment of the evidence of PW7 and accepting him as a witness of truth, with respect, we are of the view that it is a settled principle of law that 'where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to

judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed' and if an appeal is 'from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen,' an appellate court 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong' (see: *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243; *AD Caldeira v FA Gray* [1936] MLJ 137 (PC); *Loh Shak Mow v Public Prosecutor* [1987] 1 MLJ 362 (also [1986] SLR 358). And in order to be convinced that the decision of a trial judge is wrong an appellate court has a duty 'to check by critical examination of the whole of the evidence the trial judge's conclusion as to the truthfulness of that witness'…

[33] Notwithstanding that, an appellate court could reverse a finding of fact by a trial court if the finding of fact was not supported or runs against the evidence recorded before the trial court. In *Public Prosecutor v Abdul Malik bin Marahaji & Anor* [1994] 2 MLJ 430; [1994] 2 CLJ 654 a finding of fact by a session court was overturned by the High Court. It was said by the High Court:

The learned sessions judge is therefore clearly wrong in coming to the conclusion that the presumption of s 14 of the Act had been rebutted because the two accused were not doing anything connected with their official duties …,

[34] In this case it was clear that SP4 said she could not understand the oath. Despite that assertion, the learned magistrate ruled she understood the oath. I had suggested earlier that in the inquiry, a document containing the prescribed form of oath should be shown to the witness of a child of tender years in order to determine whether he could or could not understand the oath. On my scrutiny of the record I could not find any record showing SP4 was in any way was shown with the prescribed form of oath. On that basis it is highly doubtful that SP4 could understand the oath as ruled by the learned magistrate.

[35] In the premises, the finding of fact by the learned magistrate that SP4 understood the oath is a finding of fact that was not supported by the evidence or totally against the evidence. His ruling could be reversed by me. In my view and having scrutinised the records with fine tooth-comb I am of the view that SP4 could not understand the oath. Her evidence, if at all, should be admitted by the learned magistrate without oath. However, in admitting her evidence, without oath, the learned magistrate must comply the requirements mention in the proviso to s 133A.

[36] I am also constrained to make another observation based on the record before me. I found that despite the learned magistrate having ruled that SP4 understood the oath and her evidence to be admitted under oath, there was no record showing an oath was ever administered on SP4 before she started giving evidence. In the absence of this record, I must rule that her evidence was

admitted without oath. Therefore, if SP4's evidence had been admitted, it must be admitted without oath pursuant to s 133A. Had this been the situation, it was clearly not in accordance with the ruling made by the learned magistrate.

[37] As the inquiry to admit SP3 and SP4's evidence was not held in conformity to s 133A, SP3 and SP4's evidence was improperly admitted by the learned magistrate. Their evidence was not properly admitted on the ground of failure to observe procedures prescribed under s 133A. This failure had rendered the conviction becoming unsafe.

[38] KC Vohrah J had made the following observation in *Yusaini bin Mat Adam v Public Prosecutor* at p 582 (MLJ); 210 (CLJ) on the failure to observe procedure under s 133A:

> On the failure of the sessions court judge to follow the procedure in s 133A of the Evidence Act 1950, the conviction should be set aside.

[39] In *Arumugam a/l Mothiyah v Public Prosecutor* Abdul Malik Ishak J said at p 60:

> The significance of applying s 133A of the Evidence Act 1950 and s 8 of the Oaths and Affirmations Act 1949 (Revised 1977) can be fully appreciated when one bears in mind the danger as envisaged by Thomson CJ (as he then was) in the case of *Chao Chong and Ors v Public Prosecutor* [1960] 1 MLJ 238 …

[40] In *Tajudin bin Salleh v Public Prosecutor* [2008] 1 MLJ 397, Hamid Sultan JC (as he then was), at p 413 ruled:

> (d) s 133A of the EA 1950 which deals with evidence of child of tender age was introduced in 1971 by PU(A) 126/171. Such a provision is not found in India or in England. To that extent, our law on child evidence has taken a different approach, and the Indian or English cases cannot stand as an authority to interpret the mandatory provision of our statute. This section must be read together with s 118 which makes all witness competent witness and makes reference to a person of tender years. Under this section, when a child of tender years is called to give evidence, there is a duty upon the court to ensure that the child understands the nature of an oath. The evidence can be received without an oath if the court is of the opinion that the child possesses sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

[41] On the effect of non-compliance with procedure under s 133A, Hamid Sultan JC further said at p 416:

> ln this case, there is a total failure on the part of the learned magistrate to comply with provisions of s 118 as well as s 133A thereby making the conviction in law unsafe. I do not think such afailure can be cured by the provision of s 422 of the Criminal Procedure Code …

[42] I had said the evidence of SP3 and SP4 to certain extent were corroborated by SP1 and SP2 evidence. However in my view the appellant's conviction in this case could not be maintained. SP3 and SP4 evidence constitute the main evidence against the accused. Their evidence must be properly admitted before it could be corroborated by evidence of SP1 and SP2 (see *Public Prosecutor v Hj Ismail & Anor* [1940] 1 MLJ 76 and also *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134).

[43] The two cases I had cited above pertain to the evidence by an accomplice. Although SP3 and SP4 was not and could not in any way be said to be an accomplice, SP3 and SP4's evidence are doubtful, not safe to be believed and should be rejected. The evidence of SP1 and SP2 alone are insufficient in my view to secure a conviction and more importantly could not repair the defective evidence of SP3 and SP4.

[44] For the foregoing reasons, I found that the prosecution had failed to make out a prima facie case against the appellant. He should be acquitted and discharged without being called to enter his defence. Accordingly I allow this appeal. The conviction and sentence ordered by the learned magistrate is hereby set aside.

Appeal allowed, appellant acquitted and discharged.

Reported by Ashgar Ali Ali Mohamed